

SUPPORT FOR THE AMENDMENTS

Claim 5 has been amended.

Support for the amendment of Claim 5 and the introduction of Claims 10-15 is provided at paragraphs [0009], [0010], [0014], [0018], and the Examples

No new matter has been added by the present amendment.

REMARKS

Claims 1-5 and 7-15 are pending in the present application.

The rejection of Claims 5 and 10-15 under 35 U.S.C. §112, first paragraph (written description), is respectfully traversed.

In the Office Action, the Examiner rejects the amendments filed on June 8, 2009 as presenting new matter. The Examiner's rejection relates to the amendment to use the transitional term "consisting essentially of". The Examiner's rejection finds no merit. The problem is that the Examiner is looking for an explicit recitation of the words "consisting essentially of" in the specification. However, the Examiner is reminded that the description in the specification need not be in *ipsis verbis* [i.e., "in the same words"] to be sufficient to support a claimed limitation. It is sufficient for support to be found implicitly so long as the artisan would appreciate that the description as would support the new limitation. Further, the Examiner is reminded that "[the] specification, having described the whole, necessarily described the part remaining." *In re Johnson*, 558 F.2d 1008, 1019, 194 USPQ 187, 196 (CCPA 1977). Thus, if Applicants are willing to disclaim certain aspects of the invention that they would otherwise be entitled to, that is their prerogative.

Nonetheless, since the Examiner, citing MPEP 2111.03, has interpreted the scope of the limitation "consisting essentially of" to be "comprising" for purposes of searching for and applying prior art under 35 U.S.C. §102 and 103 (see paragraph bridging pages 4-5 of the Office Action mailed January 4, 2010), Applicants have amended the transitional phrase "consisting essentially of" to be "comprising". Moreover, since this amendment merely brings the scope of the claims into accordance with the scope examined by the Examiner for purposes of the Office Action mailed January 4, 2010, this amendment cannot and does not

introduce new issues for search and/or consideration and should be entered at least for purposes of appeal.

Withdrawal of this ground of rejection is requested.

The rejections of (a) Claims 5, 10, 12, and 14-15 under 35 U.S.C. §102(a) over Lines et al (US 2004/0126461) and (b) Claims 11 and 13 under 35 U.S.C. §103(a) over Lines (US 2004/0126461) in view of Demeule et al (Curr. Medic. Chem. 2002) is respectfully traversed.

The Examiner relies upon the disclosure of Lines et al (US 2004/0126461) in making the new grounds of rejection. However, Applicants submit that these rejections should be withdrawn based on the fact that Lines et al (US 2004/0126461) is not “prior art”.

Specifically, Lines et al (US 2004/0126461) published on July 1, 2004, based on an application originally filed on October 23, 2003. Applicants are aware that Lines et al (US 2004/0126461) is a continuation-in-part of U.S. application Ser. No. 10/302,544, filed November 22, 2002 and claims priority to U.S. Application Serial No. 60/420,986, filed October 23, 2002. Although there is a presumption that Lines et al (US 2004/0126461) is entitled to a filing date of October 23, 2002 for purposes of 35 U.S.C. §102(e).

In order to be entitled to this date (or alternatively November 22, 2002) for purposes of prior art under 35 U.S.C. §102(e), the subject matter relied upon in making this rejection must be fully supported by the written description of the priority applications. Applicants **submit herewith** US 6,821,536 (patent corresponding to US 10/302,544) and the original 4 page specification filed for US 60/420,986. As is evident from these two documents, Lines et al (US 2004/0126461) first disclosed the method of improving physical performance (i.e., improving an ability to perform an exercise, such as speed, strength, power, endurance, flexibility, agility, balance, focus coordination, reaction time, and fatigue recovery) in US

10/692,178, which published as US 2004/0126461 (the publication cited against the present application). Accordingly, this embodiment is only entitled to a date under 35 U.S.C. §102(e) as of October 23, 2003.

The present application claims priority to JP 2003-326140, filed on September 18, 2003, which is nearly 10 months prior to the publication of Lines et al (the prior art dated under 35 U.S.C. §102(a), July 1, 2004) and one month prior to the filing date of Lines et al (the prior art dated under 35 U.S.C. §102(e), October 23, 2003). To perfect their claims to foreign priority to JP 2003-326140, Applicants **submit herewith** certified English translation of JP 2003-326140. Applicants request that the Examiner acknowledge entitlement of the present application to the benefit of an earlier filing date provided by the claim to priority to JP 2003-326140, which is earlier than any effective "prior art" date for Lines et al. Since Lines et al is not prior art against the present claims this ground of rejection should be withdrawn.

Acknowledgement that this ground of rejection has been withdrawn is requested.

Applicants submit that the present application is now in condition for allowance.
Early notification of such action is earnestly solicited.

Respectfully submitted,

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